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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioner,

v.

JOHN A. PAWLAK and JAMES STAFFORD,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

DAVID PREVIA NT

25 Louisiana Avenue, N.W.

Washington, D.C. 20001

(202) 624-6945

Of Counsel

ROBERT M. BAPTISTE

Counsel of Record

GARY S. WITLEN

CHARLES S. DEANGELO

25 Louisiana Avenue, N.W.

Washington, D.C. 20001

(202) 624-6940

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Where attorneys' fees have been awarded on the merits under the common benefit doctrine, may a court, in the absence of statutory authorization, award fees for time spent litigating the fee application, based on a private attorney general theory?

LIST OF PARTIES

In addition to the parties listed in the caption, Charles E. Greenawalt, Local Union No. 764 Teamsters, Chauffeurs, Warehousemen and Helpers, and Teamsters Joint Council No. 53 were Defendants in the trial court and Greenawalt and Local Union No. 764 were also Appellants in the Third Circuit.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the magistrate appointed by the District Court for the Middle District of Pennsylvania is not reported and is reprinted in App. A, pp. 1-54a. The opinions of the District Court for the Middle District of Pennsylvania are unofficially reported at 110 L.R.R.M.

2625 and 111 L.R.R.M. 3069 as amended and are reprinted in App. B, pp. 55a-67a and App. C, pp. 68a-74a respectively. The opinion of the United States Court of Appeals for the Third Circuit has been reported at 713 F.2d 972 and is reprinted in App. D, pp. 75a-98a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 29, 1983, and is reprinted in App. E, pp. 99a-100a. This Court has jurisdiction to review the judgment of the court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although the underlying lawsuit arose under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 411 *et seq.*, no pertinent statutory provision provides for entitlement to fees. Therefore, the LMRDA is not directly involved in the issues presented here regarding entitlement to fees.

STATEMENT OF THE CASE

1. Statement Of Facts

This fee litigation arose from previous litigation filed by John A. Pawlak against Local Union No. 764 alleging a violation of the duty of fair representation. That lawsuit was dismissed because of Mr. Pawlak's failure to exhaust internal union remedies. *Pawlak v. Teamsters Local 764*, 444 F. Supp. 807 (M.D. Pa. 1977), *aff'd mem.*, 571 F.2d 572 (3d Cir. 1978). Pawlak and James Stafford, also a member of Local 764, then filed the instant underlying action against Local 764; Charles Greenawalt, President of the Local; the Teamsters' Joint Council; and the International Union, attacking the propriety of Local 764's decision to recover its legal expenses of \$2,635 arising

from the defense of the previous litigation and the provision of the Union Constitution involved.

The District Court held that Article XIX, § 12(b) of the Union Constitution, which provided that if a union member institutes a court action without exhausting internal remedies and is unsuccessful, the Local may recover all costs and expenses incurred by the union in defending the action, was a limit on Pawlak's right to sue and was, thus, in violation of 29 U.S.C. § 411(a)(4), Labor-Management Reporting and Disclosure Act, and was invalid. The Court, therefore, enjoined the collection of the money and enforcement of § 12(b) of Article XIX of the Union Constitution. *Pawlak v. Greenawalt*, 477 F. Supp. 149 (M.D. Pa. 1979). The Third Circuit affirmed the decision below, 628 F.2d 826 (3d Cir. 1980), and a petition for a writ of certiorari was denied by this Court. 449 U.S. 1083 (1981). An application for an award of attorneys' fees followed. This petition for certiorari arises from litigation regarding the application for fees.

2. Proceedings Below

A. The Magistrate

On April 13, 1981, Plaintiffs' Counsel filed an application for an award of attorneys' fees and costs. Absent a statutory provision entitling Plaintiffs to fees under the LMRDA, Plaintiffs' Counsel ultimately based their request for fees on the "common benefit" doctrine, relying primarily upon *Hall v. Cole*, 412 U.S. 1 (1973).

By Order of the District Court, Magistrate Durkin was assigned this matter. Following a full evidentiary hearing and submission of briefs, the Magistrate issued his Report and Proposed Findings of Fact, totalling eighty-six (86) pages, on January 29, 1982. App. A, p. 1a. The Magistrate denied the request for fees in its entirety for failure to maintain adequate records and to make proper allocations among claims and parties. While the Magistrate believed these inadequacies precluded an award

of fees on the merits and for the fee application litigation, he reviewed the legal issue of entitlement to fees for litigating the fee application in the event his recommendation denying fees was reversed. App. A, p. 21a.

In this regard, the Magistrate concluded that Plaintiffs' Counsel were not entitled to fees for litigating the fee application pursuant to the "private attorney general" approach Plaintiffs had proffered. App. A, pp. 42a-43a. The Magistrate reached that conclusion in reliance upon this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which "held that courts are *prohibited* from making *non-statutory* attorney fee awards to encourage *private attorneys general*." App. A, p. 42a. (Emphasis in original.)

In addition, the Magistrate accepted Appellant International Union's argument that Plaintiffs' Counsel were not entitled to fees for litigating the fee application pursuant to the common benefit doctrine (which was the basis for the fee award on the merits). App. A, p. 38a. The Magistrate stated that services performed in connection with the fee application conferred no further benefit on the union members and, therefore, requiring them to pay for fee litigation would result in a loss to the union members. App. A, p. 38a. The Magistrate concluded that if the District Court found that any fees should be awarded, the award should be limited to fees and costs for work on the merits. App. A, p. 53a.

B. The District Court

Plaintiffs and Defendant International Union filed Exceptions to the Magistrate's Findings of Fact and Report with the District Court. By Judgment dated May 21, 1982, App. B, p. 55a, the District Court reversed the Magistrate and awarded fees and costs in the amount of \$32,592.84 to Plaintiffs' Counsel. The District Court accepted all claimed hours at the requested rates for attorneys Levy and Fox, but rejected the requests of

attorneys Morrison, Sims and Bratton because of lack of documentation. App. B, p. 61a.

With regard to fees for litigating the fee application, the District Court held that Plaintiffs' Counsel were entitled to such an award based on Plaintiffs' "affirmation of the civil rights of union members . . . given the importance of the Plaintiffs' willingness to vindicate their own and other members' rights" Citing *Hall v. Cole*, 412 U.S. 1 (1973), *on remand*, 376 F. Supp. 460 (E.D.N.Y. 1974). App. B, p. 62a. Additionally, the District Court rejected the International Union's position that such an award would be adverse to the members' interests in that the union treasury would be the "fund" depleted to make an award. Specifically, the court argued that "the recovery of attorney's fees from the union treasury is distinguishable from the 'common fund' exception discussed above in that the union members benefited will, as a group, continue to derive benefits from the future effects of an award against the union treasury." App. B, p. 62a. Subsequently, Plaintiffs and Defendants Greenawalt and Local Union 764 moved the District Court for New Findings and Amended Judgment.

On June 28, 1982, the District Court issued an amended Order and Judgment awarding fees and costs in the amount of \$38,338.84. App. C, p. 74a. The Court's determination regarding fees for litigating the fee application was not amended except to award attorney Levy fees for time spent filing Exceptions to the Magistrate's Report. App. B, p. 72a.

C. The Court Of Appeals

An appeal was taken from the District Court's decisions and amended judgment dated June 28, 1982. On July 29, 1983, the panel of the Third Circuit which heard the appeal issued its Opinion, App. D, pp. 75a-98a, and Judgment, App. E, pp. 99a-100a, affirming in part and reversing and remanding in part the determination of the Dis-

strict Court. The Third Circuit found that Plaintiffs' Counsel's documentation was adequate and they had carried their burden of proof regarding the prevailing hourly rate in the community. App. D, pp. 86a, 88a-89a. However, the Third Circuit rejected Plaintiffs' Counsel's allocation of time among the parties and counts and remanded the matter to the District Court for a redetermination of the amount of fees owed by each Appellant.¹ App. D, p. 88a.

In determining whether Plaintiffs' Counsel were entitled to fees for litigating the fee application, the Third Circuit emphasized the fact that Plaintiffs' Counsel were acting as "private attorneys general" in "vindicat[ing] civil rights conferred by Title I of LMRDA." App. D, pp. 91a, 93a-94a. Analogizing to statutorily authorized attorneys' fee awards, the Circuit Court held that "it is the vindication of the class' statutory rights", App. D, p. 95a, that provides a basis for entitlement to fees. Further, the opinion specified that as a matter of public policy, such an award was required because "if attorneys are required to litigate for their fees but are not compensated for the time spent on such litigation, their effective rates will be reduced correspondingly" and "[a]ttorneys may become wary about taking [statutory] cases. . . ." App. D, p. 97a (citation omitted). It was the policy considerations set forth in statutory fee cases that the Third Circuit relied upon as authorization "under the court's equitable powers to compensate successful plaintiffs in a common benefit action in which the benefit consists of the vindication of the class' rights conferred by Title I of LMRDA." App. D, p. 98a.

The Third Circuit similarly rejected Appellant International Union's argument that an award of fees was not permitted because the attorney's interest in a fee

¹ By Order of the District Court, dated August 29, 1983, the case was remanded to the Magistrate for further proceedings consistent with the opinion of the Court of Appeals.

award for litigating the fee application not only did not benefit, but was adverse to, the interests of the members of the benefited class. Distinguishing the common fund fee award cases which rejected fee requests on similar grounds, the Third Circuit ruled that no conflict was created here because no fund [was] "granted or preserved by the litigation," rather, the Court concluded, such compensation "serves the public interest and the interests of the union members. . . ." App. D, p. 94a. The Court did, however, acknowledge that "the defendants' treasury is depleted" by such an award. App. D, p. 95a.

REASONS FOR GRANTING THE WRIT

In awarding fees for litigating the fee application in this non-statutory common benefit case, the Third Circuit based its decision on the desirability of providing an enforcement mechanism for vindication of LMRDA rights. Congress, in enacting Title I of the LMRDA, did not provide for awards of attorneys' fees. In essence, then, as in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), the lower court has made a non-statutory attorneys' fee award to encourage private attorneys general. Such a decision interjects the judiciary into the realm of legislative policy formulation, an area reserved to Congress.

The issue presented by this petition is the logical next step in the ever-expanding scope of attorney fee litigation in cases relying upon the common benefit doctrine. Whether fees are permitted for litigating the fee application is an issue which was not reviewed by this Court's pre-*Alyeska* decision in *Hall v. Cole*, 412 U.S. 1 (1973). However, to the extent that *Alyeska* established the general principle of judicial restraint in creating private attorneys general through granting fee awards, the Third Circuit's decision is in direct conflict with that decision. Unless checked, awarding fees for litigating fee applica-

tions will inevitably encourage protracted fee litigation, thereby unnecessarily dissipating the resources of the losing party and the already overburdened judicial system.

L IT IS IMPROPER TO AWARD FEES FOR LITIGATING A FEE APPLICATION IN A NON-STATUTORY COMMON BENEFIT LAWSUIT BASED UPON THE PRIVATE ATTORNEY GENERAL THEORY

Since the underlying action in this case was brought under Title I of the Labor-Management Reporting and Disclosure Act of 1959, the Third Circuit properly acknowledges that *Hall v. Cole*, 412 U.S. 1 (1973) controls. App. D, p. 79a. As this Court noted in *Hall v. Cole*, Title I LMRDA actions may be the basis for an award of attorneys' fees as authorized under the common benefit doctrine. *Mills v. Electric Auto-Lite*, 396 U.S. 375, 393-94 (1970). This Court did not, however, confront the issue presented here, that is, whether the same common benefit theory authorized an award of fees for time spent litigating a fee application.

Subsequent to the *Hall v. Cole* decision, this Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) holding that absent statutory authorization, the "American Rule" required prevailing parties to pay their own fees unless one of the exceptions to the rule (bad faith, common fund, common benefit) applied to the factual situation presented. While the Circuit Court appears to rely on one exception, the "common benefit" doctrine, the Court's decision emphasizes the public policy rationale which exposes its true reliance on the private attorney general theory. It was this type of judicial intervention into public policy which this Court sought to restrain in *Alyeska*.

In the Court of Appeals' decision in *Alyeska*, 495 F.2d 1026, 1030 (D.C. Cir. 1974), the District of Columbia

Circuit had emphasized the fact that the party seeking fees had sued "not only to vindicate his own interests . . . but to enjoin injuries to a broad class" Further, the Court stated that "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest" *Id.* Citing *Hall v. Cole*, 412 U.S. at 13-14, the Appellate Court concluded that "when viewed from the perspective of the broad class intended to be protected by that statute, not to award counsel fees can seriously frustrate the purposes of Congress."

This Court's response to the Court of Appeals decision in *Alyeska* was clear: "congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to . . . award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." *Id.*, at 263. Moreover, this Court clearly rejected any attempt to merge the private attorney general and common benefit concepts, implicitly concluding that the two theories were not coextensive and would not be interchanged in order to justify an award of fees. *Id.*, at 264 n.39.

Despite these admonitions, the Third Circuit in the instant litigation awarded fees based on its own perception of the public interest and in express reliance on the private attorney general theory. App. D, pp. 93a-94a. The Circuit Court reached this conclusion by improperly relying on statutorily based fee award decisions. App. D, pp. 94a-98a.

The Circuit Court finds entitlement to fees for litigating the fee application through the device of calling vindication of Title I rights a "common benefit." Viewed from this light, where there are statutory rights involved in the underlying action, but there is no authorization for the award of fees, the Third Circuit's test would auto-

matically entitle a party to fees for litigating the fee application, whenever the court found a common benefit in litigating the merits. In essence, citing an "important policy consideration," namely, absent payment of fees for litigating the fee application, attorneys' "effective rates will be reduced" and they will become wary about taking these cases, App. D, p. 97a, the Court of Appeals, has merged the common benefit and private attorney general theories. Thus, based on Respondents' suggestion,² the Third Circuit has in fact "invade[d] the legislature's province by redistributing litigation costs" in the manner they see fit absent legislative guidance. 421 U.S. at 271.

As this Court well understood in reaching its decision in *Alyeska*, "as in any instance of conflicting public-policy views, there is room for doubt on each side . . . [i]t is that unavoidable doubt which calls for specific authority from Congress before courts apply a private-attorney-general rule in awarding attorneys' fees." 421 U.S. at 264-267, fn. 39. In fact, there are numerous reasons for following a restrictive approach to the award of fees in keeping with the "American Rule," despite the suggested necessity of awarding fees to provide "full" compensation. *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 456 U.S. 717, 724-25 (1982) Most notably, "the time, expense and difficulty of litigating the fee question," *Id.*, at 725, weighs in favor of a constrained application of the American Rule, not one which may further expand the scope of the fee hearing.

Moreover, while the obvious overriding public interest in this area must be the swift and fair resolution of attorney fee disputes, public policy also favors protecting

² Counsel for Respondents argued before the Court of Appeals that "it is by acting as a *private attorney general* that the union member confers a common benefit on the entire union membership and thus becomes entitled to an award of fees from the union treasury." Appellees Brief at p. 46. (emphasis added)

the resources of the fee payer from the unsubstantiated³ and/or improper demands of the fee claimant. In the context of suits by union members against their unions, the large financial rewards which attorneys' fees may represent may have the undesirable result of inviting suits designed to harass a union, to promote the special interests of "dissident" groups, or to encourage attorney-initiated litigation.

In conclusion, the Court of Appeals has awarded fees for time spent litigating the fee application based on policy considerations it believes would best serve the public interest. Such a determination conflicts with the principles set forth in *Alyeska* in that it permits the courts to choose which of the countervailing interests and public policies are to be facilitated by the award of fees. More importantly, the Third Circuit has erroneously established a principle of law that automatically awards fees for time spent litigating the fee application whenever a common benefit has been found to justify an award of fees on the merits. Such an automatic entitlement is a far step from this Court's approach to fee awards following the "American Rule."

II. LIKE COMMON FUND CASES, THE AWARD OF FEES FOR TIME SPENT LITIGATING THE FEE APPLICATION CREATES A CONFLICT OF INTEREST BETWEEN ATTORNEYS AND BENEFICIARIES OF THE LITIGATION AND SHOULD, THEREFORE, NOT BE PERMITTED

While relying on the private attorney general theory, the Third Circuit also rejected Petitioner's argument that an award of fees for time spent litigating the fee application was not permitted because such an award does not benefit, but rather harms the benefited class. Petitioner

³ The Third Circuit accepted Petitioner's contention that Respondent had failed to allocate time and costs among the parties and counts and reversed and remanded that portion of the District Court opinion. App. D, pp. 86a-88a.

argued that counsel may recover only costs associated with that portion of the litigation that creates the substantial benefit conferred on the alleged class. This principle derives from the equitable "common fund" doctrine, identical in theory and scope to the "common benefit" doctrine. *Mills v. Electric Auto-Lite Co.*, *supra*, 396 U.S. at 392; *Hall v. Cole*, *supra*, 412 U.S. at 5-6 and n.7; App. A, p. 36a. See also, Bartosic and Minda, *Union Fiduciaries, Attorneys, and Conflicts of Interest*, 15 U.C. Davis L.R. 227, 342-46 (1981). Under the common fund theory, a plaintiff may recover only the cost of the litigation that creates, preserves, or enhances a common fund.

Since "common benefit" fees, like "common fund" fees are deemed to come out of the plaintiffs' recovery, their attorneys' recoupment of a fee for fee litigation is deemed to be adverse to a plaintiffs' interests and not a legitimate cost. *Lindy Brothers Builders, Inc. v. American Radiator*, 560 F.2d 102, 110 (3d Cir. 1976) (*Lindy II*). In fact, the conflict of interest cited in the traditional common fund cases is more pronounced in this case where the union funds that are to be used to pay the attorneys' fees for litigating the fee application, the union treasury, were not created by the litigation. Thus, in addition to "there being no benefit to the fund from the services performed by [attorneys] in connection with their fee application," *Lindy II*, 540 F.2d at 111; *Colpo v. General Teamsters Local 326*, 531 F. Supp. 573, 576-7 (D. Del. 1982), there is, in fact, a detriment to the fund. See also, *Aumiller v. University of Delaware*, 455 F. Supp. 676, 685 (D. Del. 1978), *aff'd mem.*, 594 F.2d 854 (3d Cir. 1979); *Van Gemert v. Boeing Co.*, 516 F. Supp. 412, 415 (S.D.N.Y. 1981).

The Third Circuit has refused to award fees for time spent litigating the fee application under the common fund doctrine "because the attorneys' interests in the fee application litigation are in conflict with those of the individuals benefited by the common fund." App. D, p.

92a. However, the Circuit Court concludes that there is no "fund" involved in common benefit litigation and an award of fees for time spent litigating the fee application is proper because, analogizing to statutory fee cases, App. D, p. 95a, it "serves the public interest and the interests of the union members whose Title I rights were vindicated." App. D, p. 94a. Moreover, the Court rejects Petitioner's suggestion that the source of the fee award in this case, the union treasury, is in fact a "fund," thereby establishing the conflict of interests between the class of union members and the attorneys seeking fees. App. D, p. 95a. The Circuit Court does, however, acknowledge that "it is the defendants' treasury that is depleted." App. D, p. 95a.

Unlike typical statutory fee cases where it is the Defendant that pays the fee award,⁴ here it is Plaintiffs' union treasury which is the fund or source of the fee award. As the Third Circuit noted, it was the Plaintiffs and the other union members who were the class benefited, App. D, p. 81a, that will have their union treasury depleted, App. D, p. 95a. To suggest, as the Third Circuit does, that the payment of the fee award from the treasury does not make the treasury a "fund" for purposes of analyzing the various interests involved is to ignore the obvious. See *Brennan v. United Steelworkers of America*, 554 F.2d 586, 606-07 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978), *on remand*, 501 F. Supp. 912 (W.D. Pa. 1980), *rev'd on other grounds*, 666 F.2d 845 (3d Cir. 1981). As this Court has previously recognized, it is the union treasury which is the source of funds supporting the performance of the union's collective bargain-

⁴ In statutorily based actions, as opposed to those based on the equitable common fund or common benefit doctrines, there is "no potential or actual conflict of interest between counsel . . . and the persons they represent. . . ." *Gagne v. Maher*, 544 F.2d 336, 344 (2d Cir. 1979) citing *Prandini v. National Tea Co.*, 585 F.2d at 52-53 (footnote omitted). See also, *Whitt v. Califano*, 601 F.2d 160, 161, n. 2 (4th Cir. 1979).

ing functions. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51 (1979). Thus, like "common fund" cases, an award of fees for litigating a fee application would lead to what this Court has cautioned against in another context, the "deplet[ion of] union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. BAPTISTE

Counsel of Record

GARY S. WITLEN

CHARLES S. DEANGELO

DAVID PREVIAINT

25 Louisiana Avenue, N.W.

Washington, D.C. 20001

(202) 624-6945

25 Louisiana Avenue, N.W.

Washington, D.C. 20001

(202) 624-6940

Of Counsel

Attorneys for Petitioner

Dated: October 27, 1983